Reversed and Rendered and Opinion filed March 8, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00561-CV

FIBICH & GARTH, P.C. AND DAVID C. RANKIN, Appellants

V.

HERBERT LACKSHIN, Appellee

On Appeal from the 125th District Court
Harris County, Texas
Trial Court Cause No. 97-07134

O P I N I O N

This is an appeal from an order of sanctions. On appeal, Fibich & Garth, P.C. and David C. Rankin, appellants, raise eight issues challenging the sanctions order. We reverse and render.

I. FACTUAL AND PROCEDURAL BACKGROUND

On February 10, 1997, William Yee, the plaintiff, filed suit against (1) Mister Texas Frog, Inc. d/b/a Senor Frog's Restaurant & Cantina, (2) Vicente Castro, (3) Willy Aramayo, (4) Ramon Garcia, and (5) Danny Barretto, the defendants.[1] According to Yee's original

[1] Ramon Garcia and Vicente Castro are husband and wife.

petition, on November 11, 1995, Yee entered Senor Frog's Restaurant & Cantina ("Senor Frog's"), a club located at 3101 Fountainview in Houston, Texas. After Yee passed out invitations to a party, which was to be held at a different establishment, a Senor Frog's employee asked Yee to come to the restaurant's office. In the office, Danny Barretto allegedly threatened Yee for passing out the invitations. Yee attempted to leave Senor Frog's, but before he could leave the property, he was attacked by Barretto. As a result of the alleged assault, Yee sustained serious injuries including a broken nose, deviated septum, two black eyes, hemorrhaging in the right eye, a split lip, broken teeth, and a concussion. Based on Barretto's actions, Yee alleged negligence and gross negligence against Senor Frog's and assault against Barretto. No specific claims were asserted against Castro, Aramayo, or Garcia.

Yee subsequently filed a first and then a second amended original petition. In the second amended petition, Yee added Alvarro Barretto, Danny Barretto's brother, as a defendant, otherwise the petition remained the same as the original. Approximately a year after the original petition was filed, Yee filed his third amended original petition, in which, for the first time, Yee alleged the defendants were the officers, owners, managers, and/or operators of Senor Frog's, and therefore, were negligent and/or grossly negligent because they did not take steps, such as screening the backgrounds of their employees, to prevent the type of assault that occurred. Yee also alleged the defendants acted jointly with Barretto, and thereby participated in the assault. Finally, Yee named Alberto Barretto, the father of Alvarro and Danny Barretto, as a defendant based on information that he had been named administrator for the estate of Alvarro Barretto, who had been stabbed to death after this suit was filed.

Yee ultimately filed a fourth, fifth, sixth, and seventh amended original petition. These petitions are nearly identical to the third amended petition except that: (1) in the fifth amended petition, Yee named Maria Barretto as administratrix for the estate of defendant Alvarro Barretto; and (2) in the seventh amended petition, Yee named Taizz, Inc. as a defendant alleging that either Taizz, Inc. or, in the alternative, Mister Texas Frog, Inc. were

conducting business under the name Senor Frog's on the date of the assault. Yee went to trial on this seventh amended original petition.

The case went to trial on April 6, 1999. A jury was selected and Yee put on his case and then rested. After Yee rested, Mister Texas Frog, Inc., Garcia, Castro, and Aramayo moved for a directed verdict, which was granted. These defendants then filed a motion for sanctions and then an amended motion for sanctions. In the amended motion, the defendants alleged Yee's seventh amended petition and his responses to the motions for summary judgments filed by Castro, Aramayo, and Garcia were groundless, filed in bad faith or for the purpose of harassment in violation of rule 13 of the Texas Rules of Civil Procedure. Specifically, the defendants alleged "there is no evidence that Mr. Texas Frog, Inc. either owned or operated the night club . . . on November 11, 1995; or that any of these Defendants were involved in the management and operation of the night club on that date." The defendants asked that the trial court sanction Yee's attorneys, Fibich & Garth Inc., P.C. and David Rankin, in the amount of $25,000.00.

After the defendants filed the amended motion for sanctions, Yee's attorneys filed a response to the motion and a cross-motion for sanctions. In that cross-motion, Yee asked the trial court to award him sanctions against Mister Texas Frog, Inc., Garcia, Castro, and Aramayo for filing a frivolous motion for sanctions. Yee asked to be awarded $2,018.00 for the costs, attorney's fees, inconvenience, and harassment in responding the motion for sanctions. In response to the cross-motion, the defendants filed a supplemental motion for sanctions adding the cross-motion as a another pleading allegedly filed in violation of rule 13.

On May 4, 1999, the trial court[2] conducted an evidentiary hearing on the motion and cross-motion for sanctions. On May 6, 1999, the trial court entered an order granting the defendants' amended motion and awarding $25,000.00 in sanctions to defendants' attorney,

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[2] This case was presided over by the Honorable Jack O'Neill, sitting as a visiting judge in the 125th District Court.

Herbert Lackshin. On May 18, 1999, the trial court signed a corrected order granting the defendants' amended motion for sanctions and ordering Yee's attorneys, Fibich & Garth, P.C. and David C Rankin, to pay the defendants' attorney, Herbert Lackshin, $11,382,00. According to the court's order, the amount of the award is based on a finding that the defendants' attorney, Lackshin, incurred reasonable and necessary attorney's fees in the amount of $13,400.00 in defending the suit and Yee's attorneys incurred $2,018.00 in defending the motion for sanctions and preparing their own cross-motion. Apparently, the trial court subtracted the $2,018.00 from the $13,400.00 and arrived at $11,382.00 as the appropriate award of sanctions. Appellants perfected this appeal.

II. STANDARD OF REVIEW

Whether to impose rule 13 sanctions is within the trial court's sound discretion. *GTE Communications Sys. Corp. v. Tanner*, 856 S.W.2d 725, 730-32 (Tex. 1993); *Mattly v. Spiegel, Inc.*, 19 S.W.3d 890, 895 (Tex. App.—Houston [14th Dist.] 2000, no pet.). We will not set aside a sanctions order under rule 13 unless an abuse of discretion is shown. *Id.*; *Falk & Mayfield L.L.P. v. Molzan*, 974 S.W.2d 821, 824 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). A trial court abuses its discretion by (1) acting arbitrarily and unreasonably, without reference to any guiding rules or principles, or (2) misapplying the law to the established facts of the case. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985); *Riddick v. Quail Harbor Condo. Ass'n, Inc.*, 7 S.W.3d 663, 678 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Thus, we will overturn a trial court's discretionary ruling only when it is based on an erroneous view of the law or a clearly erroneous assessment of the evidence. *See id.* In our review, we will examine the entire record. *Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996); *Randolph v. Walker*, 29 S.W.3d 271, 275 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Monroe v. Grider*, 884 S.W.2d 811, 816 (Tex. App.—Dallas 1994, writ denied).

III. RULE 13 OF THE TEXAS RULES OF CIVIL PROCEDURE

Rule 13 of the Texas Rules of Civil Procedure provides, in pertinent part:

> The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. . . . If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both.
>
> Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rules may be imposed except for good cause, the particulars of which must be stated in the sanction order. "Groundless" for the purposes of this rules means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law.

TEX. R. CIV. P. 13.

Based on the clear language of the rule, a party cannot obtain rule 13 sanctions unless he proves the claims are groundless *and* that the opposing party brought the claim in bad faith or to harass the party. *Id.* One purpose of the rule is to check abuses in the pleading process, i.e., to ensure that at the time the challenged pleading was filed, the litigant's position was factually grounded and legally tenable. *Mattly*, 19 S.W.3d at 896. The trial court must examine the facts and circumstances in existence at the time the pleading was filed to determine whether rule 13 sanctions are proper. *Id.* Bad faith does not exist when a party exercises bad judgment or negligence; rather, "it is the conscious doing of a wrong for dishonest, discriminatory, or malicious purposes." *Id.*; *Falk*, 974 S.W.2d at 828 (quoting *Campos v. Ysleta Gen. Hosp., Inc.*, 879 S.W.2d 67, 71 (Tex. App.—El Paso 1994, writ denied)). Courts must presume the papers are filed in good faith, and the party moving for sanctions bears the burden of overcoming this presumption. *Mattly*, 19 S.W.3d at 896.

IV. POINTS OF ERROR

Appellants raise eight issues challenging the sanctions order. Specifically, in issue four, appellants contend the trial court abused its discretion in awarding sanctions because the evidence is legally and/or factually insufficient to support the award. As we explain below, we agree and find no evidence in the record to overcome the presumption that appellants filed their pleadings in good faith. Because this finding is dispositive of the appeal, we find it unnecessary to address the remaining issues.

V. ANALYSIS

With the appropriate standard of review in mind, we turn to appellee's allegations. Herbert Lackshin, appellee, pointed to four specific documents, which he claims, were filed in violation of rule 13: (1) plaintiff's seventh amended petition filed December 14, 1998; (2) plaintiff's response to the motion for summary judgment filed by Castro and Aramayo on February 2, 1999; (3) plaintiff's response to the motion for summary judgment filed by Garcia on March 19, 1999; and (4) plaintiff's cross-motion for sanctions filed in response to the defendants' motion for sanctions. Appellee argued the seventh amended petition contained statements and allegations against his clients that were "groundless and false." Specifically, appellee claimed the following statement and allegations were groundless and false: (1) that his clients had a duty to protect Yee and that they failed in this duty by failing to screen the background and propensities of their employees, and by failing to adequately supervise the actions of their employees; and (2) that any of the defendants owned or operated the club or were involved in its management on the date of the assault.

Appellee contended, and argued at the sanctions hearing, that the seventh amended petition was groundless and brought in bad faith or to harass his clients because appellants knew at the time the petition was filed that Senor Frog's had been sold to Alvarro and Danny Barretto more than three months before the assault took place. He pointed out that he gave appellants a copy of the bill of sale and appellants even offered it into evidence as proof that Alvarro and Danny Barretto, respectively, owned and managed the club on the date of the

assault.

Appellee also argued groundlessness and bad faith by showing his clients were never required to answer any interrogatories, requests for admissions, or requests for production. In other words, appellants failed to secure responses to the written discovery requests propounded to his clients. Also, appellee argued, appellants never attempted to depose Mr. Texas Frog, Inc., Castro, or Aramayo. And, while appellants did notice Garcia for an oral deposition, when he failed to appear, they did not pursue a motion to compel or sanctions.

Regarding the responses to the motions for summary judgment, appellee asserted these were filed in violation of rule 13 because appellants "forcefully contested" the motions, claiming that Mr. Texas Frog, Inc. owned the club on the date of the assault, when appellant knew, from the bill of sale provided by appellee, that the club had been sold before the assault. Appellee also pointed out that appellants had Maria Barretto's affidavit in which she stated Taizz, Inc. was the owner and operator of the club on the day of the assault. In fact, appellants attached this affidavit to their response to the motion for summary judgment filed by Taizz, Inc.

As proof of appellants' alleged bad faith, appellee argued that none of the jury questions tendered to the court by appellants before trial mentioned Garcia, Castro, or Aramayo. Moreover, when appellee moved for an instructed verdict on behalf of his clients, Mr. Rankin's only response was "cut them loose."

Finally, appellant claimed the cross-motion for sanctions filed by appellants in response to his motion for sanctions was further evidence that the previous pleadings were filed in bad faith or merely to harass appellee's clients.[3]

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[3] In his brief, appellee also argues the Seventh Amended Petition was groundless in that it alleged his clients "acted jointly with the assailant and thereby participated in . . . acts of assault and battery." This allegation was not, however, raised in the amended motion for sanctions or the supplement to the amended motion. Appellee also argues in his brief that the responses to the motions for summary judgment filed by appellants violated rule 13 because in the responses, appellees claimed Mr. Texas Frog owned the club and that his clients, as officers and directors, were individually liable for the assault. Appellee, citing *Grierson v. Parker Energy Partners*, 737 S.W.2d 375, 378 (Tex. App.–Houston [14th Dist.] 1987, no writ), argues there is no basis in law or fact to support this allegation because under Texas law, a corporate officer or director cannot be held individually liable

It is clear that the thrust of appellee's contentions in the court below, with regard to the issue of groundlessness under rule 13, was that appellants knew before they filed the seventh amended petition and the responses to the motions for summary judgment that his clients were not the owners or operators of Senor Frog's on the day of the assault. Thus, by filing these groundless documents, including the cross-motion for sanctions in response to his motion for sanctions, in bad faith, appellee alleged that appellants violated rule 13. The evidence presented by appellee in support of his claim of groundlessness essentially boils down to the purported bill of sale, Maria Barretto's affidavit, and appellants' failure to adequately pursue discovery. We find this is legally insufficient to support a finding of groundlessness, and therefore, an award of sanctions under rule 13.

We begin with the purported bill of sale. On October 23, 1997, appellee sent a letter to appellants. In that letter, he stated that he had met with Garcia and Castro and was told that "the Senor Frog's location and assets" had been sold to Alvarro Barretto on August 3, 1995. According to Garcia, neither he nor Castro had any part in the operation of the club after that date. Appellee offered to present Garcia for a deposition to confirm the information. Appellee also stated in the letter that he wanted appellants to agree to dismiss Garcia and Castro from the case before they were required to respond to the discovery requests propounded by appellants on behalf of their client.

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to a third person unless he knowingly participates in the tortious act. First, this argument was not raised in the amended or supplemental motion for sanctions nor specifically raised at the sanctions hearing. Second, under Texas law, a corporate officer, director, or employee may be, depending upon the circumstances, held personally liable for torts committed in the course of his or her employment. *Luevano v. Dow Corning Corp.*, 895 F. Supp. 135, 137 (W.D. Tex. 1994); *see Leyendecker & Assoc., Inc. v. Wechter*, 683 S.W.2d 369 (Tex. 1984); *Taiwan Shtrimp Farm Village Ass'n, Inc. v. U.S.A. Shrimp Farm Dev., Inc.*, 915 S.W.2d 61, 73 (Tex. App.–Corpus Christi 1996, writ denied); *State, v. Malone*, 853 S.W.2d 82 (Tex. App.–Houston [14th Dist.] 1993, writ denied); *N.S. Sportswear, Inc. v. State*, 819 S.W.2d 230, 232 (Tex. App.–Austin 1991, no writ). Moreover, evidence in the clerk's record and evidence introduced at the sanctions hearing established there was at least a question as to whether the corporation even existed after August of 1994. According to the records of the Secretary of State, the date of the last transaction between the corporations and the Secretary's office was August 25, 1994. In 1996, the Secretary of State listed the status of Mr. Texas Frog as "DEAD." The comment to the status was that the corporation's charter had been formally forfeited for failure to pay franchise taxes. Therefore, at the time appellants filed the documents at issue, the status of the corporation and those listed as officers and agents of that corporation was at least questionable. Accordingly, we observe that alleging individual liability against appellee's clients cannot be considered groundless or in bad faith under these circumstances.

The document is dated August 3, 1995. It is hand-written in Spanish. It is signed by Castro and another person, whose signature is illegible. In this first line of the document, what is purportedly Castro's name is cut off and is then identified as "Cash" in the English translation. Though the first line names Garcia and presumably Castro as purported "receivers" of a deposit for Senor Frog's, the document may or may not have even been signed by Garcia. Next, though appellee claimed in his letter to appellants that the club was sold to Alvarro Barretto, Barretto's name does not appear in the document. The document names *Albaro Barreto* or *Albara Barreto* (depending on whether you rely on the original Spanish or the English translation), who may or may not be the same person as *Alvarro Barretto*. As we stated, there is a signature below that of Castro; however, it is impossible to tell with certainty if that signature belongs to Alvarro Barretto, beyond appellee's representation that the club was sold to Barretto and Maria Barretto's assertion at her deposition that it is her son's signature, or perhaps to Garcia as purported "seller" of the club. Finally, while the document was witnessed by two additional people, Daniel Barretto and a second person, the name of the second witness is not included in the document and his or her signature is illegible.

Appellee pointed out that attached to the "bill of sale" is an English translation. That translation, however, can only be described as incomplete:

> August 3, 1995
>
> I Ramon G. Garcia and Visenta Cash [sic] as wife receive from Mr. Albara Barreto, the quantity of $160,000.00 as a deposit for Senor Frog's, 3101 Fountainview, Houston, Texas 77057; telephone 713-977-9988.
>
> This information is based (vasa?) on the sale of the place above mentioned(?) For the total quantity of $260,000.00 that will be paid $160,000.00 of Contado (_____) $20,000.00 in a check of $40,000.00 within six (6) months and another $40,000.00 in the next six (6) months that which debt ought to be covered in this ("?") for a total of one (1) year from August 3, total of one (1) year. Date 3 August 1996.
>
> /s/Visenta Castro
>
> Tex. Lic. No. 10244801

Tex. Lic. No. 11298934
Witness:
/s/Daniel Barretto
California Lic. No. B51660020
Witness:

_____
California Lic. No. A7210188

Beyond the obvious superficial problems and aesthetics, i.e., the illegible handwriting, indecipherable signatures, the fact that the document is in Spanish and the English translation is incomplete, the substance of the document is no better at establishing the alleged sale of Senor Frog's on August 3, 1995. According to the incomplete translation, Garcia and Castro (again, presumably "Castro," given that the translated version identified whom we assume is Castro by the name "Visenta Cash") "receive" $160,000.00 as a "deposit" from someone named "Mr. Albara Barreto" for Senor Frog's. Then, apparently, another $100,000.00 is to be paid by August 3, 1996, one year from the date of the document. This, however, is conjecture given that the translation is extremely confusing concerning payment of the remaining amount: "$260,000.00 will be paid $160,000.00 of Contado (_____) $20,000.00 in a check of $40,000.00 within six (6) months and another $40,000.00 in the next six (6) months." Also, the document does not state who is to pay the remaining debt.

After reviewing this document, we find it cannot be classified as a bill of sale as alleged by appellee in his letter to appellants. A bill of sale is a legal document that conveys title from a seller to a buyer. BLACK'S LAW DICTIONARY 158 (7th ed. 1999). There is no language in this alleged "bill of sale" denoting passage of full title; rather, the document is, at best, an executory contract. An executory contract is one that is unperformed by both parties or one with respect to which something still remains to be done on both sides. *Lee v. Cherry*, 812 S.W.2d 361, 364 (Tex. App.—Houston [14th Dist.] 1991, writ denied); BLACK'S LAW DICTIONARY 321 (7th ed. 1999). Under an executory contract to convey

property, the buyer acquires an equitable right to make payments on the property and to receive a deed and legal title when he completes the payments. *See Gaona v. Gonzales*, 997 S.W.2d 784, 786-87 (Tex. App.—Austin 1999, no writ) (citing *Johnson v. Woods*, 138 Tex. 106, 157 S.W.2d 146, 148 (1941)). Until the buyer fully performs the contract, the seller retains legal title to the property, holding the title subject to the equitable rights of the buyer. *See Gaona*, 997 S.W.2d at 787.

The document provided by appellee does not state whether title transferred upon the $160,000.00 deposit, which was allegedly made in 1995, or upon payment of the full amount in 1996. Based on the language of the document, Alvarro Barretto, if he is in fact the person named in the document and whose signature appears at the bottom, merely acquired an equitable right to make the payments to purchase Senor Frog's and to receive title when he completed the payments. *See id.* Thus, at the time of the incident, legal title to the club was still held by appellee's clients through Mr. Texas Frog, Inc. Moreover, there is nothing in the record to firmly establish that Alvarro Barretto ever completed payment under the executory contract entitling him to full legal title to the property. Given the many failings of the document provided by appellee to support his claim that his clients did not own Senor Frog's on November 11, 1995, when the assault occurred, we find it was insufficient to require appellants to drop potentially liable defendants from the suit. At most, the purported bill of sale did nothing more than create a fact issue regarding (1) what, if anything, was transferred, and (2) when any such transfer was completed. Accordingly, it was hardly groundless (or in bad faith) for appellants to refuse to non-suit or dismiss the claims against Mr. Texas Frog and its owners, officers, directors, and agents.

Additionally, it was not as if appellants took no action in response to receiving the "bill of sale." Five days after they received the "bill of sale," appellants sent a letter to appellee stating that they were looking into the alleged sale and requested copies of the corporate records for Senor Frog's *documenting* the sale. In response to this letter, appellee sent a second letter, which stated in part:

> I sent you the *only document* that Ramon Garcia had regarding the sale to the Barrettos. He told me he did the deal with that single handwritten agreement.
>
> *I have no corporate documents from Senor Frogs' which support the sale*. I still have in my possession the original minute book, but *there is nothing in the minutes regarding this sale*.

(emphasis added).

This response could serve only to further obfuscate the issue of ownership of the club. Without corporate records documenting the "sale," appellants could not be sure it ever took place or was, in fact, completed. Moreover, as we stated before, pursuant to the terms of the document, the sale was not to be completed until August of 1996, long after the incident which was the subject of the underlying suit.

We now turn to the second piece of evidence relied on by appellee to support his claim for sanctions under rule 13: the affidavit of Maria Barretto. Ms. Barretto is the mother of both Danny and Alvarro Barretto. After Alvarro Barretto was stabbed, Ms. Barretto was named administratrix for his estate and added, in that capacity, as a defendant in the suit.

On November, 17 1998, before appellants filed the seventh amended petition and responses to the motions for summary judgment, they took Ms. Barretto's deposition. At her deposition, Ms. Barretto testified that she owns Casa Coso, which is the new name of Senor Frog's, through a corporation know as Taizz, Inc. Ms. Barretto stated that neither she nor any member of her family owned the club when it was known as Senor Frog's nor had they ever been involved in the operation of Senor Frog's . She suggested the club was in fact owned by Garcia.

On December 14, 1998, after appellants had filed the seventh amended petition, but before the responses to the motions for summary judgment were filed, Ms. Barretto submitted as affidavit in which she stated:

> In November of 1995, I was the sole shareholder of Taizz, Inc. Taizz, Inc. operated a restaurant and nightclub at the address of 3101 Fountainview, Houston, Harris County, Texas, 77057 in November of 1995. Neither Alvaro Barretto nor Danny Barretto was [sic] shareholders in Taizz, Inc. Further, Taizz, Inc., only operated the restaurant and nightclub at the above-mentioned address.

Appellee argued below and argues here that this affidavit established that Taizz, Inc., not his clients or Mr. Texas Frog, owned and operated the club on the night of the assault. Appellee suggests appellants' refusal to drop his clients from the suit after receiving this affidavit is particularly egregious given that appellants attached it to their response to Taizz, Inc.'s motion for summary judgment in order to defeat the motion. We disagree.

The affidavit is insufficient to establish club ownership on the night of the assault for at least two reasons. First, contrary to appellee's assertion in the supplemental motion for sanctions, the affidavit is not date specific. Appellee asserted that Ms. Barretto's affidavit stated that Taizz, Inc. owned the club on November 11, 1995. The affidavit, however, merely states that in "November of 1995," Taizz, Inc. owned the club. It does not state if Taizz, Inc. acquired the club before November 11, 1995, the night of the assault, or after. Second, and most importantly, the affidavit conflicts with Ms. Barretto's previous deposition testimony regarding ownership of the club. In her deposition, Ms. Barretto stated at least twice that neither she nor any members of her family had ever operated a club under the name "Senor Frog's." Ms. Barretto claimed that when she operated the club it was under the name "Casa Coso." She further stated that before she began operating the club it was known as Senor Frog's and was owned by Ramon Garcia. On the date of the assault, club *was* operating under the name "Senor Frog's."

We find that the affidavit is no evidence that the pleadings filed by appellants were groundless or filed in bad faith or to harass the defendants. The affidavit, much like the "bill of sale," merely created fact questions on the issue of ownership and operation on the date of the assault.

Appellee also alleged that sanctions were warranted under rule 13 because appellants never required his clients to respond to written discovery, never noticed the depositions of Castro, Mr. Texas Frog, or Aramayo, and failed to compel the deposition of Garcia after he failed to appear for a scheduled deposition. Again, we disagree.

Appellee admitted at the sanctions hearing that he had received discovery requests, e.g., requests for admissions, requests for production, and interrogatories from appellants. He stated, however, that he was trying to avoid answering those requests by providing appellants with a copy of the "bill of sale." In the letter to which the "bill of sale" was attached, appellee specifically stated that if appellants needed time to "check . . . out" the ownership issue, he would like to extend time to file responses to the discovery requests. The record reflects that appellants took action to attempt to determine ownership of the club on the date of the assault; however, none of the information provided by appellee nor their own research settled the issue to a certainty. Rather, as we have stated, the information provided by appellee (the "bill of sale" and appellee's acknowledgment that there were no corporate records confirming the alleged sale), along with Ms. Barretto's affidavit, did little to clarify the issue.

Thus, appellants did propound discovery to appellee's clients, but at appellee's request allowed appellee to defer answering discovery until appellants could investigate the issue of ownership and determine whether appellee's clients should be dismissed from the suit. After conducting an investigation, appellants were unable to resolve the issue and while there is nothing to suggest that appellants ever compelled appellee's clients to answer the written discovery requests, there is evidence that appellants continued their attempts to resolve the ownership issue through other discovery methods.

When appellants learned that appellee intended to file motions for summary judgment on behalf of his clients, they responded with the following missive:

> So that we may adequately evaluate whether your clients need to be dismissed from this lawsuit or not, I am requesting that you provide dates for the deposition of Vicente Castro. I would like to depose Mr. [sic] Castro during

> the week of May 25th if possible. I believe that if we are able to obtain Mr. [sic] Castro's deposition, the necessity of filing a motion for summary judgment will be dispensed with.

In response to this letter, appellee suggested that appellants depose Ramon Garcia rather than Vicente Castro. Specifically, appellee wrote "Vicenta Castro doesn't know much," and she speaks "little English." Appellants responded that they wished to depose "the person with the most knowledge concerning the corporate affairs and formalities of Mister Texas Frog, Inc." Based on appellee's specific recommendation regarding Garcia's knowledge and Castro's lack of it, appellants stated that Garcia's deposition would suffice. Appellants then stated that if the deposition testimony established appellee's clients were not proper parties, they would be dismissed from the suit. The letter concluded by appellants asking appellee to provide deposition dates in accordance with their request to depose the person most knowledgeable with respect to corporate affairs.

A month after this letter, appellants sent another letter to appellee stating that they were still waiting for him to provide potential dates for Garcia's deposition. After receiving this letter, appellee asked appellants to "hold off" because Garcia was in Mexico and appellee was trying to find him. After waiting yet another month, appellants then wrote to appellee and told him that unless he provided deposition dates, they would notice Garcia's deposition on a date of their choosing, September 7, 1998.

Appellee was unable to locate Garcia and appellants noticed his deposition. Garcia did not appear and a certificate of nonattendance was produced for the record. Appellee appeared at the deposition and stated on the record that he had received the notice of deposition, but could not deliver it to Garcia. According to appellee, he attempted to locate Garcia for six weeks and was advised that he was somewhere in Mexico.

Appellants did not seek a motion to compel or request sanctions against Garcia or appellee for the nonappearance. Appellee argues this favors a finding of groundlessness and bad faith. We can hardly agree. Appellants relied on appellee's representations in

determining whom to depose and diligently pursued the person appellee identified. That appellants chose not to file a motion to compel or request sanctions for Garcia's failure to appear is hardly evidence that the petition and summary judgment responses were groundless or brought in bad faith. Indeed, the fact that appellants did not seek enforcement of the numerous discovery rule violations committed by appellee's clients (failure to appear for deposition, failure to answer interrogatories, and failure to respond to production requests) is no evidence that the claims brought by appellants on behalf of their client were not based in law or fact.

The record establishes that far from neglecting discovery, appellants granted extensions and pursued depositions based on representations made by appellee. It is ironic that appellee would now seek to turn appellants' reliance on his requests and representations into evidence supporting rule 13 sanctions.

After reviewing the record under the appropriate standard of review, we find there is no evidence to support appellee's claims that the pleadings filed by appellants were groundless, much less brought in bad faith or to harass appellee's clients. To obtain sanctions under rule 13, a party must prove the claims are groundless *and* brought in bad faith or to harass. *See* TEX. R. CIV. P. 13. Appellee, who bore the burden of overcoming the presumption that the pleadings were filed in good faith, failed to present sufficient evidence to establish groundlessness or bad faith. The evidence provided by appellee did little more than raise a fact issue concerning ownership of the club on the night of the assault. Because we find the evidence is legally insufficient to support the award of sanctions, we hold the trial court abused its discretion in awarding sanctions to appellee.

Accordingly, we reverse the trial court's judgment and render judgment that appellee take nothing.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed March 8, 2001.

Panel consists of Justices Edelman, Wittig, and Frost.

Do Not Publish — TEX. R. APP. P. 47.3(b).